**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **GEORGE A. CINK, DECEASED** | ) | |
| Claimant | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| **FARMERS OIL FUELS, LLC** | ) | |
| Respondent | ) | Docket No. 1,025,903 |
| | ) | |
| AND | ) | |
| | ) | |
| **FEDERATED MUTUAL INSURANCE CO.** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant requested review of the January 4, 2008 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The parties waived oral argument and this matter was placed on summary docket on April 8, 2008.

### APPEARANCES

Randall W. Schroer, of Kansas City, Missouri, appeared for the claimant.[1] Vincent A. Burnett, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

[1] For purposes of consistency, this Order will refer to the "claimant" as George A. Cink, the deceased worker. All parties agree that the sole surviving heir is Twilladean R. Cink, and in reality, she is the claimant.

## ISSUES

The ALJ held that while the "claimant was exposed to a substantial external force while working in the sun on the hottest and most humid day in July" he failed to establish by competent evidence "that the external force (heat) was a substantial and causative factor in producing claimant's death."[2] Rather, based upon the testimony of Dr. Farrar and Dr. Francisco, the ALJ concluded that claimant's death was not causally related to his work or the weather, but to severe coronary artery disease. Accordingly, based upon K.S.A. 44-501(e) (sometimes referred to as the Heart Amendment), no benefits were due under the Kansas Workers Compensation Act.

The claimant's surviving spouse has appealed this Award and alleges the evidence does indeed establish (through Dr. Lee's testimony) that it is more likely true than not that claimant suffered a heart attack as a result of the extreme heat of the day and his efforts in transferring fuel from one storage vessel to another on July 19, 2005. Accordingly, the claim is not barred by the terms of the Heart Amendment and benefits are due and owing.

Respondent contends the ALJ was correct in her analysis and that the Award should be affirmed. Respondent contends that the claimant's death resulted from his severe pre-existing cardiac conditions which were unrelated to his work or the weather and that claimant has failed to carry the burden of proof that the claimant's death was from unusual exertion or external force when compared to a baseline of his everyday work activities. Thus, the Heart Amendment precludes any recovery.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

As noted by the ALJ, the basic facts of this case are not disputed:

> The parties agree that claimant began working for respondent in 1975 as a fuel delivery driver. On July 19, 2005, claimant delivered fuel to the Casner Farm in Milton, Kansas. Dixie Brewster found claimant's body propped up against the tire of his truck and called for emergency assistance. Claimant was pronounced dead at the scene and an autopsy was performed which revealed that claimant died of severe cardiac disease.[3]

The ALJ went on to frame the issue to be resolved as follows:

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[2] ALJ Award (Jan. 4, 2008) at 4.

[3] *Id.* at 3.

> There is no dispute that claimant sustained a fatal heart attack while in the course of his employment with respondent on July 19, 2005. The ultimate issue for the Court to decide is whether K.S.A. 44-501(e) prohibits compensability of this claim.[4]

As correctly noted by the ALJ, resolution of this claim is governed by the provisions of K.S.A. 44-501(e). If the statute applies, then claimant (or his surviving spouse) is not entitled to any compensation and the ALJ's Award should be affirmed. If, however, the Board finds that claimant's heart attack was caused by something more than the claimant's usual work, and that exertion caused his resulting heart attack, then compensation is owed.

K.S.A. 2005 Supp. 44-501(e), known as the Heart Amendment, provides that:

> (e) Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

The goal of this statute is "not to deny compensation to claimants who suffer injury on the job, but rather to avoid requiring the employer to act as an absolute insurer of claimants whose death or disability was merely the result of the natural progress of disease and which coincidentally occurred at the workplace."[5]

The Kansas Supreme Court, in *Makalous*,[6] addressed the language contained in K.S.A. 44-501 dealing with the "usual vs. unusual" dispute created by the "Heart Amendment" to K.S.A. 44-501, stating:

> "What is usual exertion, usual work, and regular employment as those terms are used in the 1967 amendment to K.S.A. (now 1972 Supp.) 44-501 will generally depend on a number of surrounding facts and circumstances, among which the daily activities of the workman may be one, but only one, among many factors.
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> "Whether the exertion of the work necessary to precipitate a disability was more than the workman's usual work in the course of his regular employment presents a question of fact to be determined by the trial court."[7]

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[4] *Id.*

[5] *Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 199-200, 62 P.3d 236 (2003).

[6] *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977).

[7] *Id.* at 481; citing *Nichols v. State Highway Commission*, 211 Kan. 919, Syl. 3 and 4, 508 P.2d 856 (1973).

Then more recently, the Supreme Court determined that the law requires the claimant to show "'that the exertion of the work necessary to precipitate the disability was *more than the [employee's] usual work* in the course of [the employee's] regular employment.'"[8] And that a baseline for the claimant is necessary to establish what is *usual* so that a determination can be made as to what is *un*usual, "'particularly when "[u]nusualness may be a matter of degree and may appear in the duration, strenuousness, distance or other circumstances involved in the work.'"[9]

In this instance, claimant was a 73 year old man with no apparent heart problems other than high blood pressure and claudication in the lower extremities.[10] The high blood pressure was confirmed by claimant's family physician and dates back to 1976.[11] He was hired to work as a fuel delivery driver and on July 19, 2005, he was delivering fuel to a residence which he had been driving to for a number of years. At some point in the process, he apparently discovered that he had poured diesel fuel in the wrong tank and began to remove the fuel.[12]

Claimant was found sometime thereafter by Dixie Brewster. She discovered claimant sitting by his truck, leaning up against a tire, looking "very comfortable".[13] He appeared to her to be sleeping. His hat was off and his glasses and teeth were tucked away inside his hat, sitting to his side.[14] According to Ms. Brewster, there was no indication that claimant had fallen off the tank. In fact, it appeared to her that he placed himself in that position.[15] When she could not wake him or find a pulse, she called for help and an ambulance was summoned. Claimant was pronounced dead at the scene.

On July 20, 2005, an autopsy of the claimant was performed by Dr. Jamie Oeberst, who concluded that the claimant had severe three vessel coronary artery atherosclerosis, moderate three vessel coronary artery atherosclerosis, remote subendocardial myocardial infarct(s), moderate to severe thickening and calcification of the aortic valve leaflets,

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[8] *Mudd*, 275 Kan. 192, citing *Nichols*, 211 Kan. 923.

[9] *Id.* at 192, citing *Chapman v. Wilkenson Co.,* 222 Kan. 722, 728, citing 1A Larson, The Law of Workmen's Compensation § 38.64(a)(1973).

[10] R.H. Trans. at 7 and 11.

[11] R.H. Trans. at 11; Blunk Depo at 9, 12-14.

[12] Graves Depo. at 14-15.

[13] Brewster Depo. at 7.

[14] *Id.*

[15] *Id.* at 8

cardiomeglay with left ventricular hypertrophy.[16] He ultimately concluded the cause of death was atherosclerotic cardiovascular disease.[17]

During the trial of this matter, no less than four physicians testified as to claimant's physical condition and his cause of death. Dr. Blunk, claimant's family physician, established that although he treated claimant for high blood pressure since 1976, a condition that can be a risk factor for coronary disease and congestive heart failure and claudication, claimant had sought treatment for no other cardiac complaints.[18]

At claimant's request, Dr. Gerald Lee, a now-retired cardiologist, reviewed the claimant's medical records, the autopsy report, along with the relevant weather records and concluded "to a reasonable degree of medical certainty, the heat index being in the 100 to 101 degree range at the time of death, proved to be a significant factor to produce ventricular fibrillation and sudden cardiac death."[19] According to Dr. Lee, the autopsy revealed blunt force injuries to the head and neck with no underlying injury to the skull or brain. And there were blunt force injuries to the right side of the chest and right buttock.[20] And as a result of these injuries as well as information contained within the autopsy report that suggested claimant had been on top of the truck, he concluded claimant must have fallen from off the top of the truck.[21] The time of death was found to be 2:20 p.m.

It is worth noting that Dr. Lee was not aware that claimant was found propped up against a tire with his hat, glasses and teeth resting beside him. And when presented with that fact, he steadfastly refused to amend his opinion that claimant fell from the top of the truck. According to Dr. Lee, the claimant's lack of oxygen while on top of the truck led to confusion and ultimately he fell, scraping his forehead and his cheek, physical injuries which the coroner noted at the autopsy.

In August of 2007, Dr. Farrar, a board certified and actively practicing cardiologist, examined claimant's medical and employment records along with the autopsy report and weather records. According to Dr. Farrar, claimant's cardiovascular condition at the time of his death was "terrible".[22] Claimant was obese, had hypertension (controlled by

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[16] Lee Depo., Ex. 2 at 2 (Apr. 25, 2006 report).

[17] *Id.*

[18] Blunk Depo. at 10-13.

[19] Lee Depo., Ex. 2 at 1.

[20] *Id.*, Ex. 2 at 1.

[21] *Id.* at 24.

[22] Farrar Depo. at 5.

medication), and a history of claudication. Dr. Farrar testified that the five findings listed on the autopsy report "clearly caused his death".[23] He further opined that the heat was not an extreme external force in claimant's death as he believed claimant had acclimated to the heat based upon his work history. Dr. Farrar ultimately concluded that there was no reason to believe that the claimant would have died on July 19, 2005 if not for his underlying cardiovascular disease and there is no evidence that the heat played an role in the claimant's death.[24]

Another physician, Dr. Dan Francisco, a cardiovascular physician, reviewed the claimant's medical records and concluded that based on the weather data, "it is likely that Mr. Cink was acclimated to the July weather at the time of his demise".[25] He stated that the claimant was not exposed to unusual weather or work conditions at the time of his demise, and that neither would be a contributing external force causing his death.[26]

Just like Drs. Lee and Farrar, Dr. Francisco also stated that the claimant's autopsy revealed that he had severe preexisting organic heart disease i.e. hypertension, severe three-vessel coronary disease, including multiple 90 percent stenosis, old myocardial infarction, left ventricular hypertrophy, severe aortic stenosis, and peripheral vascular disease at distance from the heart. He stated that "[t]he cardiac vascular anatomy placed him at a VERY high risk of malignant ventricular arrhythmias, which ultimately caused his death. In Dr. Francisco's opinion the "claimant suffered ventricular fibrillation due entirely to his preexisting, undiagnosed, SEVERE cardiac disease".[27] These conditions according to Dr. Francisco compromise blood flow and can give rise to arrhythmias and heart attacks, which can be life threatening. He also stated that a blocked artery could cause chest pain, shortness of breath, dizziness and loss of consciousness. He stated that 30 to 40 percent of the time the first time a person finds out that they have a blocked artery is when they have a heart attack or die suddenly.[28]

Dr. Francisco attributed the claimant's death to "a malignant ventricular arrhythmia, resulting in out-out-hospital sudden death, due entirely, entirely, without any equivocation, due to his abnormally severe cardiac substrate".[29] Dr. Francisco also stated that the fact

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[23] *Id.* at 7.

[24] *Id.*, Ex. 3 at 2.

[25] Francisco Depo., Ex. 2 at 1 (Jan. 22, 2007 report).

[26] *Id.*

[27] *Id.* Emphasis in original.

[28] *Id.* at 17.

[29] *Id.* at 24.

that the claimant worked in extreme heat did not put him at a greater risk because he worked in those conditions for many years and was acclimated to the heat.

The ALJ concluded that "claimant's heart attack[30] was not caused by unusual exertion within the meaning of K.S.A. 44-501(e). Indeed, there is no evidence in the record which suggests that claimant put forth unusual exertion while fueling and then removing the fuel on July 19, 2005."[31]

The Board has considered the ALJ's conclusion along with the evidence contained within the record and finds that it should be affirmed. Claimant had been a long time employee who was charged with delivering fuel to various customers. This job required him to be outside day in and day out, pulling out the fuel line, pumping the fuel, and then retracting the fuel line. There is nothing in the record that indicates that claimant was involved in any out-of-the ordinary activity on this particular day. At any given time he might have to syphon fuel out of a tank but there is nothing within any of the witnesses' testimony that suggests that that activity is particularly strenuous. Nor is there any evidence that claimant had actually begun that task, beyond possibly just filling out some paperwork while sitting in the cab of his truck. Because claimant was working alone and there were no witnesses, it is merely speculation to suggest that claimant was in the process of doing anything strenuous, particularly given the position he was in when he was found. And again, as far as the record reveals, this task was part of his normal work duties. Thus, the ALJ's conclusion is well supported by the evidence.

The ALJ accepted claimant's contention that the heat constituted an "external force" under the *Makalous*[32] rationale but concluded that claimant failed to establish that the external force (heat) was a substantial and causative factor in his death as required by the case law. The ALJ was persuaded by the testimony of Drs. Farrar and Dr. Francisco over that offered by Dr. Lee. The Board affirms this conclusion. Dr. Lee was steadfast in his opinions but clearly relied upon evidence that was based upon speculation and hearsay. Specifically, Dr. Lee was firmly convinced that claimant fell from the top of the truck when there was no witness testimony to suggest that was the case. It is true that claimant's body bore abrasions at the time he was found, it requires an unsubstantial leap of imagination to believe that those abrasions occurred as a result of a fall from the truck just before he died. This is particularly so when claimant was found sitting up, as if resting, with his glasses off, his hat off and his teeth removed. Those are the acts of one who is resting, indeed more likely in the throes of an ischemic attack as a result of his heart arrhythmia than of one who just fell from a truck.

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[30] Based on the medical testimony, the claimant did not have a heart attack. Rather, he had an arrhythmia.

[31] ALJ Award (Jan. 4, 2008) at 3.

[32] *Makalous,* 222 Kan. 477.

For these reasons, the Board affirms the ALJ's finding that claimant failed to meet his essential burden of establishing that the heat was a substantial and causative factor in producing his death.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 4, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this _____ day of April 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Randall W. Schroer, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge